Supreme Court, U.S.
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No. 86-1840

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

OLIVER H. CLAYPOOL, JR., AND OLIVER H. CLAYPOOL, JR. AS NEXT FRIEND OF OLIVER J. CLAYPOOL, CHRISTINE O. CLAYPOOL, AND ROBERT L. CLAYPOOL, Appellants,

v.

ELIZABETH J. CLAYPOOL, Appellee.

ON APPEAL FROM THE SUPREME COURT OF SOUTH CAROLINA

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

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June 30, 1987

TABLE OF CONTENTS

Page

Argument..... 1

POINT I

THE JURISDICTIONAL STATEMENT CLEARLY ESTABLISHES THAT THIS COURT HAS JURISDICTION AND APPELLEE'S ATTACK THEREON IS AS LACKING IN MERIT AS IT IS LACKING IN SUPPORTING PARTICULARS..... 1

POINT II

APPELLEE'S MOTION SHOULD NOT BE RELIED UPON SINCE IN INSTANCE AFTER INSTANCE IT CONTAINS MISSTATEMENT AND/OR MISLEADING STATEMENTS..... 3

POINT III

THE JURISDICTIONAL STATEMENT ESTABLISHES BEYOND A DOUBT THAT THIS CASE PRESENTS SUBSTANTIAL FEDERAL QUESTIONS..... 15

POINT IV

APPELLANTS' FEDERAL QUESTIONS WERE TIMELY AND PROPERLY RAISED BELOW AND THEY WERE EXPRESSLY PASSED UPON BY THE HIGHEST COURT OF THE STATE..... 16

Conclusion..... 20

TABLE OF AUTHORITIES

CASES: Page

Caldwell v. Mississippi,
472 U.S. 320 (1985)..... 19

Michigan v. Long, 463 U.S. 1032 (1983) 19

Orr v. Orr, 440 U.S. 268 (1979)..... 18

Phillips v. Phillips, 288 S.C. 185,
341 S.E.2d 132 (1986)..... 8

R. J. Reynolds Tobacco Co. v. Durham
County, N.C., 55 LW 4034, (1986). 20

Stembridge v. Georgia,
343 U.S. 541 (1952)..... 17

Street v. New York 394 U.S. 576 (1969) 17

Wheatly v. Wheatly, 339 S.E.2d 149 (SC App. 1985)..... 9

Zucht v. King, 260 U.S. 174 (1922).... 15

STATUTES AND RULES

South Carolina Code Sections:

20-7-870..... 10

20-7-880..... 10

20-7-4000..... 11

Note: The Transcript of Record on Appeal to the Supreme Court of South Carolina is designated herein as "TR"

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ARGUMENT

POINT I

THE JURISDICTIONAL STATEMENT CLEARLY ESTABLISHES THAT THIS COURT HAS JURISDICTION AND APPELLEE'S ATTACK THEREON IS AS LACKING IN MERIT AS IT IS LACKING IN SUPPORTING PARTICULARS.

Appellee's Motion to dismiss or affirm alleges at the bottom of page 1 that appellants' Jurisdictional Statement "misstates the record below in an attempt to develop proper jurisdiction in this Court." A similar allegation found at page 5 is apparently the entire substance of point 1 of appellee's argument and slightly reworded it forms the bulk of her Conclusion at page 10.

But careful search of appellee's Motion reveals that it fails to present any example of such claimed misstatement. In its entire length there is not a

single instance where it specifies or refers to any particular misstatement made in the Jurisdictional Statement.

In fact, such a search of appellee's Motion reveals only two things concerning misstatements. First, that it confirms appellants' statement found in their Jurisdictional Statement at p. 37-38 that in its Order of February 27, 1986, the family court misstated that the father "was served with a Rule to Show Cause under Family Court Rule 53..." for as appellee admits at the bottom of page 3, the father was not served as "(t)he Rule was returned unserved...." Second, that comparison of appellee's Motion with the Transcript of Record reveals, as detailed below, that it is appellee's Motion that contains misstatement after misstatement with many misleading statements as well.

Thus point I of the appellee's argument is totally without foundation. It is also totally without merit for the most searching and careful comparison of the Jurisdictional Statement and the TR reveals that the Jurisdictional Statement contains no misstatements but faithfully sets forth a concise statement of the facts material to consideration of the questions presented and it clearly establishes this Court's jurisdiction.

POINT II

APPELLEE'S MOTION SHOULD NOT BE RELIED UPON SINCE IN INSTANCE AFTER INSTANCE IT CONTAINS MISSTATEMENT AND/OR MISLEADING STATEMENTS.

For example, while the above quoted material from the bottom of page 3 of appellee's Motion, that "(t)he Rule was returned unserved...." is correct, the appellee goes on to incorrectly state

that such was "due to the fact that the Appellant (father) had not advised the Clerk's office of his proper address as required by the October, 1985, Order of the Family Court." This is misstatement and/or misleading for at least the following reasons: 1) there is nothing whatsoever in the record to substantiate it; 2) at all times since the beginning of this case in S. Carolina, the father has kept the family court, the clerk thereof, and appellee advised of his address; 3) if the clerk of court had any incorrect address it was supplied by appellee, who from the beginning has supplied the clerk with an address for the father that does not exist; 4) law enforcement officials knew where appellants lived for they had observed them there for some several days prior to the original ex parte order; 5) the father could easily have been served

at his regular place of employment where he was always found within minutes after issuance of the ex parte orders.

Appellee's motion goes on to misstate that the "Horry County Sheriff served the Bench Warrant on appellant at his employment..." while the undisputed and binding Statement of the Case below, correctly reveals that no warrant was served and although a deputy stated he had a warrant, when asked what it was for, he replied, "it was not like most warrants he had seen but that it was blank." TR 7, line 1-3.

Appellee continues: "Upon arrival later that day the appellant was immediately escorted to Judge Maring's courtroom. By the time appellant arrived at Judge Maring's courtroom, the court session was over because Judge Maring was required to attend mandatory judicial

training. Judge Maring rescheduled the case to the next court session and set a $1,000.00 payment to be applied toward the child support arrearages as a condition for appellant's release. Apellant's attorney had requested the matter to be rescheduled so that the Appellant could file pleadings in response to the contempt and to modify the prior support order."

But again appellee misstates the case, for when the father arrived at the Sheriff's office (which is in the courthouse) the morning session of court in which he was allegedly to appear was still in session. The undisputed and binding Statement in the TR states: "On arrival at the sheriff's office the father was taken into custody. The father requested a hearing before being incarcerated but said request was

denied." TR 7, L 9-11. The record also reveals the pleadings to which appellee refers were filed at 11:54 A.M. on December 11, 1985, TR 56 and the primary relief requested was "custody and control of the parties' minor children." TR 57. (If more detail is wanted, it is that after the father was in custody he was taken to the judge's office and when appellee's counsel later arrived the judge came off the bench and refusing to give a hearing stated the father should stay in jail until further order of the court or until he paid $1,0000.00 at which time he could be released for a hearing to be set. TR 7, 58-59, 359 L 18-25.)

Without citation to any authority, appellee states at the bottom of p. 4 through p. 5 of her Motion, "Appellant did not follow the South Carolina statutory procedures to stay his sentence

pending appeal and served the sentence." But that is incorrect, for the "contempt order had been automatically stayed for the filing of the Notice of Intent to Appeal" Phillips v. Phillips, 288 S.C. 185, 187, 341 S.E.2d 132 (1986). The father was kept in prison at forced labor even after the stay.

At page 5 appellee notes appellants also seek relief in Michigan and Indiana. But what appellee doesn't say is that while in this Court she urges that South Carolina does not have jurisdiction but that Michigan does, both appellee and her counsel Ferguson refuse to accept service of appellants' motions in the Michigan court; the Michigan Friend of the Court takes the position that its court does not have jurisdiction; and the Michigan court will not hold a hearing. In Indiana, appellee refused service,

slammed her door in the deputy sheriff's face, has yet to answer the petition served by mail, and asserts that jurisdiction does not lie in Indiana.

In appellee's Motion the phrase that appears most often is that such and such an order was "not appealed". But what appellee does not tell this Court is that the orders to which she refers were temporary, interlocutory or otherwise not disposing of the whole subject matter of the litigation and thus could not be appealed, Wheatly v. Wheatly, 339 S.E.2d 149 (SC App. 1985), and/or that they were entered without jurisdiction and hence void and without effect, or that they were invalid as obtained by the appellee by fraud or that they were no longer valid due to subsequent changes of circumstances which appellants clearly alleged and established. That the South

Carolina Supreme Court totally rejected appellee's res judicata claims is clear for it could not otherwise have reversed the family court to the extent that it did unless it found that claim to be completely without merit.

Specifically, concerning the constitutionality of sections 20-7-870 and 20-7-880 of the South Carolina Code, appellee suggests appeal was foreclosed by a failure to appeal the December 11, 1985 Bench Warrant Order since as appellee states "(t)hose code sections do not provide any legal or factual basis for the rulings in the Order ... of February 27, 1986." (True, as appellants' assert, they are constitutionally invalid.) But what appellee doesn't state is that sections 20-7-870 or 20-7-880 were never mentioned in any order prior to the February 27th Order which

for the first time indicated that the father was arrested pursuant thereto and that pursuant thereto his motions for vacation of the Bench Warrant, which had included as grounds therefore, the constitutional invalidity of such statutes, were denied. See, JS 30-42.

Appellee next asserts the issue is moot. Obviously, it is not. JS at 9 and 46-47. And that the alleged Bench Warrant is not in the TR is not the fault of the appellants. Did it even exist? It was never served upon any appellant. And appellee's statement that appellant was not incarcerated until after he appeared before the court is simply another of appellee's misstatements. TR 7 L9-14, TR 58-59, TR 359.

In connection with the constitutional invalidity of section 20-7-4000, appellee asserts the father served the sentence

and the question is moot. But the question is not moot for the father is faced with the same situation again. Appellee next asserts that the sentence allowed the father to purge himself and so it was not forced labor. But the South Carolina Supreme Court has already found that the father was unable to purge himself. (Apparently under appellee's theory, the death penalty could be assigned in civil contempt matters, for after all, if the deceased didn't want to die he could have purged himself. And the cruelty of appellee's theory, absurd on its face, really becomes apparent when one realizes that during this case a man was killed as a reult of being sentenced for civil contempt in South Carolina.) Appellee asserts that no forced labor requirement is found in the statute. But the only purpose of the statute is to

send people who have not committed crimes to the state minimum security prison where all prisoners are at forced labor. Appellee's assertion that appellants failed to timely appeal etc. is absurd. Obviously, appellants appealed and the South Carolina Supreme Court, albeit summarily, expressly denied the appellants' federal exceptions on appeal thereby upholding the validity of the statutes making appeal here proper pursuant to 28 U.S.C. 1257(2).

At the bottom of page 9 and top of page 10 appellee totally misstates the facts when she states appellants were given "an opportunity to be heard at a full and plenary hearing held on February 7, 1986, based on his pleadings and the contempt for failure to pay child support" for appellants' pleadings properly requested that custody of the

children be with their father but on February 7, 1986, the family court despite having agreed to hear such evidence, despite having acknowledged in its January 8, 1986 Order that the appellants had a federal constitutional right to be heard on said issue, despite the fact that over 20 witnesses (some from as far as Ohio and Michigan) appeared ready to testify for the children and the father, reversed itself, and refused to allow any evidence or testimony on the issue of the custody of the children. It also refused to allow any testimony or evidence concerning the invalidity of orders obtained by the mother's fraud upon the Michigan court. It also refused to allow any testimony or evidence in exculpation, extenuation or mitigation of the alleged contempt.

Appellee alleges at the top of page 10 that the father indicated in testimony on February 7, 1986, that "he had removed all of his assets except his automobile and the bond money from the state of South Carolina." Such a statement is both wrong and misleading for the father had not removed any of his assets, the bond money did not belong to him, and there was no such testimony.

POINT III

APPELLANTS' JURISDICTIONAL STATEMENT ESTABLISHES BEYOND A DOUBT THAT THIS CASE PRESENTS SUBSTANTIAL FEDERAL QUESTIONS.

Under Point II of appellee's argument, appellee misquotes Zucht v. King, 260 U.S. 174 (1922), but goes on to correctly state that this Court will not hear appeals that do not raise a substantial federal question. But beyond making that general statement, appellee

makes no argument that the questions in this case are not substantial federal questions such as are quite properly heard on appeal in this Court.

Appellee fails to suggest any case that would be controlling so as to make the federal questions presented here insubstantial. She asserts no challenge to the applicability and continued validity of case after case of this Court cited in appellants' Jurisdictional Statement at pages 49-63 showing that substantial federal questions are presented. Obviously, appellants have presented substantial federal questions and this Court should resolve them.

POINT IV

APPELLANTS' FEDERAL QUESTIONS WERE TIMELY AND PROPERLY RAISED BELOW AND THEY WERE EXPRESSLY PASSED UPON BY THE HIGHEST COURT OF THE STATE OF SOUTH CAROLINA.

Appellee quotes from Stembridge v. Georgia, 343 U.S. 541, 547 (1952), that "(w)here the highest court of the state delivers no opinion and it appears that the judgment might have rested upon a non-federal ground, this Court will not take jurisdiction to review the judgment." But the instant case is just the opposite of Stembridge for here the highest court of South Carolina did deliver an opinion, and not only did they not rest their judgment upon non-federal grounds, it clearly appears that the judgment could not have rested upon a non-federal ground. Obviously, Stembridge has no applicability.

The only other case cited by the appellee is Street v. New York, 394 U.S. 576, 582 (1969) from which she quotes that when the "highest state court has failed to pass upon a federal question,

it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." But this too is clearly inapplicable, for in the instant case the South Carolina Supreme Court's opinion did reach and decide the appellants' federal questions. While admittedly, it did so summarily, its decision nevertheless clearly reveals that it specifically intended to reach all of the appellants' federal questions and that it denied them on their merits rather than due to any failure in their presentation or other procedural defect. Orr v. Orr, 440 U.S. 268 (1979) is satisfied. In any event, Street was heard in this Court because he did show that he had properly presented the federal questions in the state courts just as the Jurisdictional Statement reveals appellants have done.

More recent cases clearly reveal that this Court has jurisdiction. In Michigan v. Long, 463 U.S. 1032, (1983) the state court made reference to both state and federal law, this Court thoroughly explored this issue and definitively concluded: "Rather than dismissing the case, or requiring that the state court reconsider its decision on our behalf because of a mere possibility that an adequate and independent state ground supports the judgment, we find that we have jurisdiction in the absence of a plain statement that the decision below rested on an adequate and independent state ground." 463 U.S. at 1044.

And in Caldwell v. Mississippi, 472 U.S. 320, 327, (1985) this Court stated: "The mere existence of a basis for a state procedural bar does not deprive this Court of jurisdiction; the state

court must actually have relied on the procedural bar as an independent basis for its disposition of the case."

R. J. Reynolds Tobacco Co. v. Durham County, N.C., 55 LW 4034, 4037 (1986) came to the Court after the North Carolina Supreme Court summarily granted appellee's motion to dismiss for lack of a substantial federal constitutional question. This Court stated: "In the absence of positive assurance to the contrary from the North Carolina Supreme Court, we consider that court's dismissal of Reynold's appeal to be a decision on the merits."

CONCLUSION

For the above stated reasons, appellants pray that appellee's Motion to Dismiss or Affirm be denied and that this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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